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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 132.

BALTIMORE & OHIO RAILROAD COMPANY,
PETITIONER,

DEFENSE

J. G. LEACH, RESPONDENT.

REPLY BRIEF FOR PETITIONER.

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Of Counsel.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 132.

BALTIMORE & OHIO RAILROAD COMPANY, - - *Petitioner,*

versus

J. G. LEACH, - - - - - *Respondent.*

REPLY BRIEF FOR PETITIONER.

I.

The brief of counsel for J. G. Leach is largely taken up by an advancement of the claim that no bill of lading was issued to Leach at the time of shipment, and that, therefore, the stipulations of the bill of lading can not control this case.

This argument is based on an excerpt from the testimony of Leach found at page 54 of the Record. This testimony was incidental to the question as to whether Leach had given a notice, and in no way addressed to the inquiry as to the issuance or non-issuance of a bill of lading at the time the shipment was received by the initial carrier.

That question was in no way involved at the trial because concluded by the condition of the pleadings

Section 126 of the Civil Code of Practice of Kentucky provides as follows:

“Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed, excepting these, which must be proved, though not traversed:

“(1) Allegations of a petition, or cross-petition, against a defendant who is under any disability except coverture.

“(2) Allegations of an answer, or reply, so far as it states a set-off or counter-claim against a new party who is under any disability except coverture.

“(3) Allegations against a defendant constructively summoned, who has not appeared in the action.

“(4) Allegations concerning value or amount of damage not accompanied by an allegation of an express promise, or by a statement of facts showing an implied promise, to pay such value or damage; such allegations, so accompanied, need not be proved unless traversed.”

The fourth paragraph of the answer of the Railroad Company (*Record*, p. 16) stated:

“They say that under said act of Congress these defendants are required to issue every shipper of an interstate shipment a bill of lading or contract containing all of the terms governing said shipment, and they say that the said Baltimore & Ohio Railroad Company did deliver to the said shipper, the plaintiff herein, a contract or bill of lading signed by the plaintiff and defendant Baltimore & Ohio Railroad Company, which contains all of the terms and stipulations of said contract of shipment, a copy of which is filed herewith. They say that one of the terms of said contract is as follows:

“(Here follow terms of stipulation relied on.)”

The reply to this answer may be found on page 20 of the *Record*, and it will be seen that said reply in no way controverts the allegations just referred to.

There was, accordingly, no issue at the time of the trial upon which any proof was relevant, concerning the issuance of a bill of lading.

The following excerpt from the opinion of the Court of Appeals demonstrates the correctness of this position (*Record, p. 69*):

“The Federal statute, known as the Carmack Amendment, to the Interstate Commerce Act, was invoked and it was plead that the bill of lading was made and delivered to the shipper, under the provisions of that statute; and further, that the appellee did not within five days deliver a claim for damages in writing, verified by his affidavit or that of his agent, to the general freight agent of appellant at Cincinnati, Ohio, or to the connecting carrier, the Cincinnati, New Orleans & Texas Pacific Railway Company. These averments of answer were undenied, but, instead, the appellee replied in avoidance of them,” etc.

The Carmack Amendment provides as follows:

“That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor;”

and, although there was no question made upon the subject, the proof shows that such receipt or bill of lading was issued and signed by both the carriers and the shipper.

By referring to page 56 of the Record, it will be found that at the trial the original bill of lading, which was signed not only by the carriers, but by the shipper, Leach, himself, was produced, exhibited to Leach and identified by him as the one he signed.

"Q. I show you—is that the original contract shipment between you and the B. & O. with the B. & O.?"

A. That looks like it.

Q. That is your signature.

A. It looks like it might be mine, there is a part of it torn off.

Q. That is the original I believe—that is your signature?

A. I suppose so, when I wrote them they sent me the contract—

Q. That is your signature?

A. I didn't sign but one contract, one (one) shipment, yes, sir; that is the one they are supposed to hold."

Thus the question made in respondent's first point is beside the case both by reason of the actual fact and the pleadings in this case.

II.

Point 2 of respondent's brief is devoted to a commendation of the argument of Judge Hurt denying our contention, as evidenced in the opinion in this case, and, in fact, a submission of the respondent's case upon the strength of Judge Hurt's opinion.

In this connection it may be interesting to note that on December 10, 1918, in the case of **L. & N. v. Ben Johnson and A. B. Wells**, reported in 182 Ky. 418, the Court of Appeals of Kentucky overruled (*though not in terms*) the case now before this Court, together with the cases of **Howard & Callahan v. I. C.**, 161 Ky. 783, and **C. N. O. & T. P. R'y v. Smith & Johnston**, 165 Ky. 235, saying:

“The next question to be determined is, may the notice provision be waived? Heretofore we have been inclined to answer this question in the affirmative. *Howard & Callahan v. I. C. R. R. Co.*, 161 Ky. 783, 171 S. W. 442; *C. N. O. & T. P. R. Co. v. Smith & Johnston*, 165 Ky. 235, 159 S. W. 987; *B. & O. R. Co. v. Leach*, 173 Ky. 452, 191 S. W. 310. Indeed, we construed the case of *Georgia F. & A. Railway Co. v. Blish Milling Co.*, 241 U. S. 190, 60 L. Ed. 948, as not being decisive. *B. & O. R. Co. v. Leach*, *supra*. Other courts, however, have taken a different view of the scope and effect of that decision and have held it conclusive of the question. *Wall v. Northern Pac. R. Co.* (Mont.), 161 Pac. 518, L. R. A. 1917c; *Banaka v. Mo. Pac. R. Co.*, 193 Mo. App. 345, 186 S. W. 7; *Kemper v. Mo. P. R. Co.*, 193 Mo. App. 466, 186 S. W. 8; *Donoho v. Mo. P. R. Co.*, 193 Mo. App. 610; 184 S. W. 1149. The same interpretation was given to that opinion by the U. S. Supreme Court in the case of *Mo. K. & T. R. Co. v. Ward*, 244 U. S. 383, 61 L. Ed. 1213, wherein it said:

“The railway companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore, as stated in *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 197, 60 L. Ed. 948, 952, 36 Sup. Ct. Rep. 541, the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal act. * * * A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.’ ”

And in ordering a reversal, issued the following directions:

“Since the required notice was a condition precedent to the right of recovery and such notice was not

given and could not be waived, it follows that the trial court should have directed a verdict in favor of the defendant."

We therefore ask that the case be reversed.

Respectfully submitted,

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Supreme Court of the United States.

October Term, 1918.

No. 132.

B. & O. R. R. Co., et al., Petitioners,

v's.

J. G. LEACH, Respondent.

BRIEF FOR RESPONDENT.

The respondent, J. G. Leach, brought suit 22d January, 1915, against the petitioner in the Circuit Court of Scott County, Kentucky, for neglect in transporting forty-one head of cattle from East St. Louis, Ill., to Georgetown, Ky. Upon trial, the jury found for the plaintiff in the sum of \$372 against the B. & O. R. R. Co. A motion for a new trial was overruled; judgment was entered, and a bill of exceptions allowed. Upon appeal, the Court of Appeals of Kentucky affirmed the judgment.

The testimony shows that the cattle reached Cincinnati in an "exhausted condition, and worn out; weak. Three were down and one dead" (Rec., 29). The only defence submitted was that the bill of lading contained a provision that no claim for damages occurring under the contract

with Leach should be allowed unless a claim for loss or damage be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the general freight agent of the railroad in Cincinnati within five days from the time the stock is removed from the car or cars (Rec., 16, 17).

The respondent, Leach, testified that on October 6th, when the stock arrived, he went to the pen, counted the cattle and found them short three; "we looked up the agent, Mr. Meyers, and told him that my cattle was short three; and we counted them and I told him that I had a claim against the railroad for damages, and that I was going to file claim against them" (Rec., 54).

Mr. Leach it appears did not have a bill of lading.

"Q. Did you have a bill of lading at that time?

A. No, sir; when I shipped these cattle out of St. Louis the B. & O. man—this bill—lading he usually give to me.

(Objection by counsel for defendant to witness stating what the custom is; objection sustained.)

Well, I went off and left there and had to write there for it. He didn't hand it to me and went on out of the office without it, and I wrote the men of the firm that I bought the cattle from and to get me a bill lading and mail it to me as soon as possible, and they didn't send it and I wrote the second time—my letter must have been misplaced or something—and about the 14th, 15th or 16th they wrote me—mailed me a bill lading back and I attended to the matter as I have said" (Rec., 55).

It is proved, therefore, that no bill of lading was issued to Mr. Leach at the time he had his stock shipped. Several days elapsed after the injury had been inflicted before the shipper received a bill of lading. He had to write for such

a bill to be sent to him; and it is a fair presumption that it was not until its receipt that he became aware that the condition in regard to filing a claim for damages was contained in it.

Not a word can be found in the testimony to contradict the statement made by Mr. Leach. Nowhere do the defendants attempt to prove a delivery of the bill of lading to Mr. Leach at the time of shipment. In their answer (Rec., 16) they do not aver that a bill of lading was issued to Mr. Leach at that time. All that they do aver is that the railroad "did deliver to the said shipper, the plaintiff herein, a contract or bill of lading signed by the plaintiff and defendant, etc." (Rec., 16).

Had it been the fact that a bill of lading was handed to Mr. Leach at the time the shipment was made, the counsel for the railroad company would have seen to it that an averment to that effect was inserted in the pleadings; and would have brought one or more witnesses to the stand for the purpose of sustaining that averment.

The defendants' witness, Mr. Myers, agent for the railroad at Georgetown, Ky., testifies in regard to his advice to Mr. Leach: "I told him he would have to get a notice and expense bill and a freight bill, and also his bill for the amount of damages and file them" (Rec., 62).

The Court of Appeals of Kentucky, in their opinion overruling the railroad's petition for rehearing, say "The answer of the appellant does not show that the bill of lading in the instant case was issued in accordance to or under the published tariffs or regulations of appellant. There is no direct averment nor proof that the bill of lading was issued in compliance to the provisions of the Interstate Commerce Act" (Rec., 70).

We are therefore amply sustained in our position that the case shows that no bill of lading was issued to the shipper at the time that the stock was taken on board of the car.

POINTS OF LAW.

I

THE DEFENSE THAT THE OWNER OF THE CATTLE DID NOT COMPLY WITH THE CONDITION OF THE BILL OF LADING BY FILING A CLAIM IN WRITING WITHIN FIVE DAYS OF THE TIME THE STOCK WAS REMOVED FROM THE CAR HAS NO MERIT—FOR THE REASON THAT A BILL OF LADING WAS NOT ISSUED TO HIM UNTIL AFTER THE INJURY HAD BEEN INFLICTED, AND THE CATTLE TAKEN FROM THE CAR.

The object of requiring a shipper who complains of loss or damage to file a claim in writing, supported by affidavit, within five days after his cattle are removed from the car, is plain enough. The railroad has a right to be notified seasonably, so as to look into the facts as soon as possible after the occurrence of an alleged loss. This object was attained by the communication made by Mr. Leach to the railroad agent, Mr. Myers. The railroad was promptly advised that the cattle had not been properly treated.

We are not claiming that verbal notice will suffice, where by the terms of a contract written notice and affidavit are demanded. We are only contending that in the case at bar, the condition as to filing a claim could not be put in force against the shipper, for the reason that the existence of such a condition had not been brought home to him at the time his cattle were put on board the car. It is not enough that the substance of the contract be communicated to the shipper. The Act in explicit terms makes it the duty of the carrier to "issue" a bill of lading. The terms of the contract must be reduced to writing, and a receipt or bill, setting forth these terms, must be put into the hands of the owner of property to be transported. No notice of a character such as is set up by the defendant can be relied upon unless the requirement of the statute is strictly complied with. So reasonable is this position that there is no

need of citing authority. The requirement as to issuing a bill of lading is contained in what is known as the Carmack Amendment. It is to be found in full in the report of *Atlantic Coast Line v. Riverside Mills*, 219 U. S., 195.

The opening language is as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor."

(34 U. S. Stat., 595.)

II

ASSUMING THAT THE REQUIREMENT IN THE BILL OF LADING FOR MAINTAINING A SUIT WAS BINDING ON THE SHIPPER, IT WAS WAIVED BY THE AGENT OF THE RAILROAD.

While we feel confident that the failure of the B. & O. R. R. to issue a bill of lading to Mr. Leach at the time of shipment disposes of this case, we deem it our duty to pay a measure of attention to the elaborate argument of the petitioners that the condition as to bringing suit could not be waived. This duty is the more readily admitted when the opinion of the Kentucky Court of Appeals is seen to be largely devoted to an examination of the question of waiver. That Court passes upon several announcements of the Supreme Court of the United States, interpreting the Interstate Commerce Acts, and concludes that there was a waiver (Rec., 68-75).

We need not repeat what has been so cogently presented in Judge Hurt's opinion. The examination of the decisions of this Court extends down as late as December, 1916, *Chesapeake & Ohio Ry. Co. v. McDaughlin*, 242 U. S., 142.

The fact is worth noting that in the *Blish v. Miller* case,

241 U. S., 190, the time allowed for filing claim for loss or damage is four months, as contrasted with five days in the case at bar. To be sure it was flour that was carried. The transportation of cattle may justify the fixing of a shorter period, but a limit of five days is certainly unreasonable. In the *Blish* case Mr. Justice Hughes aptly observes: "The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation." To require a shipper, or his agent, to furnish an affidavit within five days suggests a hope of escaping liability.

The question of what may be considered as reasonable notice of a claim for loss or damage has recently been made the subject of legislation by the Congress. We quote from the Act of March 4, 1915, as follows:

"It shall be unlawful for any common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." (38 U. S. Stat., 197.)

Of decisions by this Court rendered later than December, 1916, and relied upon by petitioners, we may remark that in *Missouri, K. & T. Ry. Co. v. Ward*, 244 U. S., 283, the Court found that the record disclosed no evidence of intention to make a waiver.

There is really nothing in the reasoning put forward that waiving the requirement of a bill of lading cannot be sus-

tained because a railroad may thus favor one shipper and not another, and so defeat the purpose of legislation, which is to treat everybody alike. It might just as well be contended that in a jury trial against a railroad company, the defendant's counsel who would readily concede this or that fact should be prohibited from so doing, because in defending suits the railroad company might favor one plaintiff, and not another.

When Mr. Leach promptly told Mr. Myers, agent for the railroad, that having sustained a loss he wanted to make out a claim, Mr. Myers' reply contained nothing in the shape of a favor granted by the railroad. The rigid requirement of an immediate presentation of facts sworn to—a device to discourage suits—is done away with by the action of the shipper in informing the railroad that he had sustained a loss, and was going to make a claim. Such speedy action on the part of the shipper accomplishes everything that the terms of the bill of lading aimed to bring about. To pretend that a Court in holding a railroad bound by the act of its agent in receiving information in this manner is thereby affording the railroads of the country an opportunity to favor some of its shippers at the expense of the public, is a novel doctrine that will hardly bear criticism.

We repeat then that there is an entire absence of proof that the petitioner was bound by the condition as to bringing suit set forth in the bill of lading. We therefore respectfully ask that the judgment of the Court of Appeals of the Court of Kentucky be affirmed.

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